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CITATIONS

676956—43

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 605

JACOB SIEGEL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinions of the Circuit Court of Appeals (R. 891, 916) are reported in 150 F. 2d 751. The findings of fact, conclusion, and order of the Federal Trade Commission (R. 646) are not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered October 9, 1945 (R. 918–919). The petition for writ of certiorari was filed November 15, 1945. The jurisdiction of this Court is invoked

under Section 5 (c) of the Federal Trade Commission Act, as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45 (c), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commission, having determined that the use of the word "Alpacuna" to describe or designate coats made of a fabric containing alpaca but no vicuna fiber was deceptive and misleading, abused its discretion in requiring discontinuance of the use of the word "Alpacuna".

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
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> * * * * *
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> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or car-

ries on business, * * *. * * * Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, * * *. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act the Commission concluded that the acts and practices of petitioner set forth in the Commission's findings constituted unfair methods of competition in interstate commerce and unfair and deceptive acts and practices in such commerce (R. 653). The Commission thereupon entered an order directing petitioner to cease and desist from using in interstate commerce the acts or practices specified in six numbered subparagraphs of the order (R. 654–655).[1]

[1] The Commission ordered petitioner to cease and desist from:

1. Representing that respondent's coats contain guanaco hair.

2. Representing that the Angora goat hair or mohair used in respondent's coats is imported from Turkestan or any other foreign country.

3. Representing through the use of drawings or pictorial representations, or in any other manner, that respondent's

In a proceeding brought in the court below, petitioner challenged only that part of subparagraph 6 of the order which requires petitioner to discontinue use of the word "Alpacuna" to designate or describe coats made of fabric containing no vicuna fiber (R. 892). The court affirmed the validity of all the provisions of the order. Petitioner now seeks review of the affirmance of only that part of subparagraph 6 which it unsuccessfully challenged in the court below.

Petitioner does not now question the sufficiency of the evidence to support the findings of the Commission (Pet. 2). Among these findings the following are deemed pertinent:

Petitioner has manufactured and sold overcoats since 1930 and topcoats since 1931 or 1932, designated by it as "Alpacuna" coats (R. 648, 649). The overcoats are made of a fabric having a face or pile composed of approximately 50% alpaca,

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coats contain fibers or materials which they do not in fact contain.

4. Representing that coats made of fabrics which have a cotton backing are composed entirely of wool or of wool and hair.

5. Using any advertising matter or causing, aiding, encouraging, or promoting the use by dealers of any advertising matter which purports to disclose the constituent fibers or materials of coats composed in part of cotton, unless such advertising matter clearly discloses such cotton content along with such other fibers or materials.

6. Using the word "Alpacuna," or any other word which in whole or in part is indicative of the word "vicuna," to designate or describe respondent's coats; or otherwise representing, directly or by implication, that respondent's coats contain vicuna fiber.

20% mohair, and 30% wool worked into a cotton backing. The face comprises approximately 70% and the cotton backing 30% of the entire fabric. (R. 648.) The topcoats are made of a fabric essentially the same as the facing of the overcoat but contain no cotton backing (R. 649). It is undisputed that neither the overcoats nor topcoats contain any vicuna fiber (R. 652). Petitioner sells these coats to retail dealers who in turn sell them to the purchasing public (R. 649).

Petitioner's use of the name "Alpacuna" tends to deceive a substantial part of the purchasing public by inducing the erroneous belief that the coats contain vicuna fiber (R. 652).

The court below held that there was substantial evidence to support the finding of the Commission that the word "Alpacuna" is misleading and deceptive to a substantial portion of the purchasing public (R. 897), and that the prohibition against the use of the word "Alpacuna" was not an abuse of the discretion as to remedy vested in the Commission (R. 901–902). The court stated, however, that it thought the prohibition "far too harsh" and would modify the order to permit use of the word with "qualifying language" if the "control of the remedy" which it possessed under the decision of this Court in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, had not been taken from it by subsequent decisions of this Court, under other statutes, vesting discretion as to remedy in the administrative agency (R.

898–902). Upon rehearing restricted to possible modification of the Commission's order (R. 915), the court adhered to and confirmed its original decision (R. 916).

ARGUMENT

The Circuit Court of Appeals held that judicial review of orders of the Commission was limited to determining if the Commission had abused the discretion vested in it to select the remedy necessary to give adequate protection to competitors and the public (R. 902). This was clearly correct. The contention that this holding is at variance with the decision in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, and merits review by this Court, has previously been urged in an unsuccessful application for a writ of certiorari to review a comparable order of the Commission. *Parke, Austin & Lipscomb* v. *Federal Trade Commission*, No. 392, October Term 1944, certiorari denied, 323 U. S. 753. The "abuse of discretion" test was not explicitly rejected in the *Royal Milling* case, and it was approved in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81, by a unanimous court the following term. None of the circuit courts of appeals decisions cited by petitioner as in conflict (Pet. 5) adopts a different rule. In each of them the order of the Commission was modified to conform to the findings or the evidence, and none declares that as to remedy the test is anything but abuse of discretion.

The further suggestion that the court below erred in holding that the Commission did not abuse its discretion presents no important question of federal law and does not conflict with any applicable decision of this Court. The decision in *Federal Trade Commission* v. *Royal Milling Co., supra,* has not been interpreted as laying down any general rule that a corrective statement to accompany a misleading brand name is adequate in all cases to remove the deception which it causes and that any contrary determination by the Commission is to be set aside as an abuse of discretion. In *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67, the Commission found that use of the words "California white pine" to describe products of the *Pinus ponderosa* was deceptive and entered an order prohibiting use of the word "white" to describe such products. This Court, in sustaining the order, said (pp. 81–82) that "the Commission did not abuse its discretion in reaching the conclusion that no change of the name short of the excision of the word 'white' would give adequate protection."

The courts in some of the cases in which they have upheld orders of the Commission requiring discontinuance of a misleading word as against the contention that an accompanying explanatory statement would adequately cure the deception, have pointed out that when the misleading word was absolutely false in its connotation, "it cannot be qualified; it can only be contradicted." *Fed-*

eral Trade Commission v. *Army and Navy Trading Co.*, 88 F. 2d 776, 779–780 (App. D. C.); *H. N. Heusner & Son* v. *Federal Trade Commission*, 106 F. 2d 596, 597 (C. C. A. 3); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429, 431 (C. C. A. 4). The evidence in the present case, in addition to showing that the implication of the word "Alpacuna" was absolutely false, showed that the dealers used advertisements of their own design over which petitioner had no control (R. 727, 730). Certainly, it was not unreasonable for the Commission to conclude that adequate protection of competitors and the purchasing public required a form of relief which would remove the danger of retail dealers advertising the brand name without corrective words.

CONCLUSION

The ruling below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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